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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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LAMONT JULIUS MCLAUGHLIN,

PETITIONER

v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a conviction for use of a dangerous weapon during a bank robbery, in violation of 18 U.S.C. §2113(d), despite proof by the government that the weapon used was not dangerous, violates a defendant's right to a fair trial?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Lamont Julius McLaughlin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 5, 1985.

OPINION BELOW

On June 5, 1985, the United States Court of Appeals for the Fourth Circuit affirmed Mr. McLaughlin's conviction for use of a dangerous weapon during a bank robbery. Appendix at A-1. Mr. McLaughlin's conviction was entered on October 29, 1984, by the United States District Court for the District of Maryland. Appendix at A-2.

JURISDICTION

On June 5, 1985, the United States Court of Appeals for the Fourth Circuit summarily affirmed Mr. McLaughlin's conviction for use of a dangerous weapon during a bank robbery, entered on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). See Supreme Court Rule 17.1(a), (c).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2113(a), (d):

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE

On July 31, 1984, the grand jury for the District of Maryland returned a three-count indictment in which Lamont Julius McLaughlin and a co-defendant were charged with bank robbery, bank larceny, and assault with a dangerous weapon during the commission of these offenses, all in violation of 18 U.S.C. §2113(a), (b), (d), (f). At his arraignment on August 10, 1984, Mr. McLaughlin entered pleas of not guilty to these charges and was held in custody in lieu of bond. On September 9, 1984, Mr. McLaughlin entered pleas of guilty to the charges of bank robbery and bank larceny (counts one and two of the indictment). He was found guilty of the armed assault charge (count three of the

indictment) after a bench trial based on stipulated evidence.^{1/}

After completion of a presentence investigation report by the United States Probation Office, Mr. McLaughlin was, on October 29, 1984, sentenced as follows: Commitment to the custody of the Attorney General for a period of imprisonment of twenty (20) years on count one, eight (8) years on count two, and twenty-five (25) years on count three, counts one and two to be served concurrently with each other and concurrently with count three. Mr. McLaughlin is to become eligible for release on parole after serving one-third of his sentence, pursuant to 18 U.S.C. §4205(a).

Notice of Appeal was filed timely on October 30, 1984. On April 4, 1985, Mr. McLaughlin filed his Appellant's Brief and Joint Appendix with the United States Court of Appeals for the Fourth Circuit, along with a Motion to Adopt and Consolidate his Appeal with that of United States of America v. Lawrence Edward Johnson, Jr., No. 83-5268. The Federal Defender's Office for the District of Maryland represented both appellants and the sole issue raised by Mr. McLaughlin was similar to the third of three issues raised by Mr. Johnson. That Motion was granted by the Fourth Circuit on April 10, 1985, and the cases were consolidated for purposes of appeal.

Appellants then filed a Suggestion for Initial Hearing In Banc, on April 11, 1985. Thereafter, the Government filed a consolidated Brief in both appeals and also moved for summary affirmance and deconsolidation of Mr. McLaughlin's Appeal. Mr. McLaughlin filed his Response to Appellee's Motion for Summary Affirmance and for Deconsolidation on May 23, 1985. On June 5, 1985, the United States Court of Appeals for the Fourth Circuit granted the Government's Motion, summarily affirming and

^{1/}. The statement of facts proffered by the Government in support of the guilty plea served as the stipulated evidence on which Mr. McLaughlin was convicted of count three of the indictment.

deconsolidating Mr. McLaughlin's appeal.

This Petition for Writ of Certiorari has followed.

STATEMENT OF FACTS

At 9:30 a.m. on July 26, 1984, two black males wearing gloves and stocking masks entered the federally insured Equitable Bank at Cedonia Mall, Radecke Avenue, Baltimore, Maryland. One of these men was Mr. McLaughlin, who positioned himself in the lobby area and, at gunpoint, ordered everyone in the bank to put up their hands and not to move. The other was Ronald Hall, the co-defendant. He vaulted over the tellers' counters and ordered one of the tellers to open a money drawer. After Mr. Hall removed the money from that drawer, he repeated the procedure with another teller. When Mr. Hall noticed a Baltimore City police officer outside the bank, he and Mr. McLaughlin fled.

As they ran out of the bank they were confronted by the Baltimore City police officer who held them at gunpoint until police support arrived. At that time various items were seized from Mr. McLaughlin and his co-defendant, including a brown paper bag containing \$3400 in United States currency bound with bank wrappers, and the handgun displayed by Mr. McLaughlin in the lobby of the bank. As the Assistant United States Attorney stated during the guilty plea and bench trial: "the evidence would show (that this handgun) was not loaded." Appendix at A-7.

Although Mr. McLaughlin initially identified himself using an alias, he was quickly identified correctly whereupon he confessed to the crime with which he was charged, and implicated his co-defendant.

REASONS FOR GRANTING CERTIORARI

This case presents one issue for review:

Whether a conviction for using a dangerous weapon during a bank robbery, in violation of 18 U.S.C. 2113(d), when the Government's evidence is that the weapon, an unloaded handgun, was not dangerous, violates a defendant's right to a fair trial.

On this issue there is a split among the Circuits. The Second, Eighth and Ninth Circuits have held that an unloaded handgun is not a dangerous weapon and may not support a conviction under 2113(d).

The Fourth Circuit has consistently followed its ruling in United States v. Bennett, 697 F.2d 596 (4th Cir. 1982), allowing a conviction under 2113(d) for use of an unloaded handgun during a bank robbery.

No other Circuit has adopted the Bennett rule in the face of direct evidence that the weapon was not dangerous.

- I. A DEFENDANT'S RIGHT TO A FAIR TRIAL IS VIOLATED WHEN HE IS CONVICTED OF USING A DANGEROUS WEAPON DURING A BANK ROBBERY WHEN THE GOVERNMENT'S EVIDENCE PROVES THE WEAPON WAS NOT DANGEROUS

In addition to the bank larceny and bank robbery charges to which Mr. McLaughlin pled guilty, he was convicted of the aggravated form of bank robbery proscribed by 18 U.S.C. §2113(d), which carries an enhanced penalty. The bench trial, which lasted but a few minutes, was based on stipulated evidence.

The stipulated evidence proffered at Mr. McLaughlin's bench trial (found in the Appendix at A-3 to A-12) alleged that Mr. McLaughlin entered a bank with another person. During the robbery, Mr. McLaughlin remained in the lobby area, pointing an unloaded handgun generally at the people in the bank.

The essential starting point of an analysis of this issue is the simple truism that §2113(a) and §2113(d) are different and were plainly meant to be different. These subsections provide, in pertinent part, that:

- (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

The first, charging bank robbery, contemplates assaultive behavior - "by force and violence, or by intimidation" - in the taking or attempt to take money or property from a financial institution. The second contemplates, in part, an assault aggravated "by the use of a dangerous weapon or device." Common sense and precedent establish beyond question that the term "assaults" is so modified, and that the language of §2113(d) "clearly requires the commission of something more than the elements of the offense described in §2113(a)." United States v. Beasley, 438 F.2d 1279, 1283 (6th Cir. 1971); Simpson v. United States, 435 U.S. 6, 11 n.6 (1978). It is equally clear, of course, that an interpretation of the aggravating element of §2113(d) must recognize and incorporate this basic difference between these two subsections of the federal bank robbery statute.

A number of courts have construed §2113(d) in manner which maintains this distinction within, and the integrity of, this statutory scheme. See, e.g., United States v. McAvoy, 574 F.2d 718, 720-22 (2nd Cir. 1978); United States v. Cobb, 558 F.2d 486, 488 (8th Cir. 1977); United States v. Potts, 548 F.Supp. 1239 (N.D. Calif. 1982). In essence, these courts find that an "apparent ability" to carry out a threat to inflict bodily injury does not alone satisfy the aggravated elements of §2113(d). Rather, an objective capability, i.e., a loaded firearm, must be established by direct proof or permissible inference. On the other hand, a number of circuits have not required this "objective capability" to carry out such a threat, and have permitted conviction under this subsection regardless of the existence of any proof that the gun was loaded or fired during

the robbery. See, e.g., United States v. Shanahan, 605 F.2d 539 (10th Cir. 1979). United States v. Beasley, 438 F.2d 1279 (6th Cir. 1971).

In a variety of factual settings, the Fourth Circuit has adopted the latter, subjective standard, and has refused to require the prosecution to demonstrate that a firearm was in fact operable and loaded during the robbery. In United States v. Shelton, 465 F.2d 361 (4th Cir. 1972), the bank robber had menacingly pointed a sawed-off shotgun at bank employees during the course of the robbery. The Fourth Circuit specifically noted that, while the gun was loaded, the defendant did not offer any testimony whatsoever that the gun was, in fact, unloaded or would not fire. Id. at 363. The Fourth Circuit's decision that the evidence supported a conviction under §2113(d) rested firmly on the perception that to require the prosecution to prove that the gun was loaded or fired during the robbery would be "to adopt a construction so rigid in its application as to make a nullity of the statute and to rob it of its manifest purpose." Id. at 362. Again referring to the undesirability of placing such a burden of proof on the prosecution, the court later observed that the actual facts concerning this question are peculiarly known to the perpetrators of the crime and unavailable to law enforcement. Therefore, the Fourth Circuit concluded that to adopt Shelton's position "would serve to render this section of the statute totally ineffective." Id. at 363.

In United States v. Newkirk, 481 F.2d 881 (4th Cir. 1973), the defendant was charged with putting a life in jeopardy during a bank robbery, pursuant to 18 U.S.C. §2113(d). There, the robber pointed a firearm, described as a .38 caliber revolver, at a teller as he ordered her to fill a bag with money. Without further analysis, the Fourth Circuit found the holding in Shelton to be controlling. Thus, following the proposition that an aggravated assault under §2113(d) has been committed

"irrespective of whether there was any proof that the gun was loaded or fired during the robbery," the court upheld the conviction of assaulting or placing in jeopardy the life of the teller. Id. at 883, quoting Shelton, 465 F.2d at 363. Apparently, as in Shelton, the defense did not establish or seek to prove that the firearm was, in fact, not loaded or otherwise incapable of being fired.

The upshot of the Fourth Circuit's decisions in Shelton and Newkirk is, at a minimum, that a presumption of danger, sufficient to satisfy the aggravated element of §2113(d), will arise upon proof that a firearm was displayed during a robbery. Given the absence of any proof that the firearm was unloaded or inoperable, these cases may stand for no more than the proposition that the requisite danger is presumed if a firearm is displayed.^{3/} In any event, based on the Shelton analysis, followed in Newkirk without explication, it is apparent that the Fourth Circuit was concerned with placing an unrealistic burden on the prosecution to prove that the firearm was, in fact, loaded or capable of firing. In order to avoid this difficult burden of proof and to give effect to the statutory scheme, the Fourth Circuit did not require a showing of the weapon's inherent dangerousness in the absence of direct contradictory evidence.

However, the Fourth Circuit moved well beyond the realm of permissible inferences or presumptions in United States v. Bennett, 675 F.2d 596 (4th Cir. 1982). There, the rifle used in the robbery was found cocked but unloaded in an alley outside the bank. Based on this direct proof that the firearm did not have the actual, as opposed to apparent, capability to harm, the defendant sought to distinguish Shelton and Newkirk and contended

^{3/}. Relevant to whether the Fourth Circuit merely established a presumption to benefit the prosecution is its observation that some courts have reached substantially the same result as in Shelton "by finding that the brandishing of the gun in the face of bank employees warrants an inference that the gun was loaded." 465 F.2d at 363 n.1.

that the evidence did not satisfy the aggravated element of §2113(d). The court concluded broadly that "[a] weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded." Id. at 599. Concluding that such mere exhibition violates §2113(d), the court emphasized the potential harm generated by the display of weapons during a robbery:

Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. A robber might well strike a recalcitrant teller with an unloaded rifle; a guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might well trigger precipitous action on the part of frightened or nervous bank employees or bystanders.

Id. Proceeding on this basis, the Fourth Circuit affirmed the conviction under 2113(d).

However, Bennett is neither legally sound nor factually controlling of the present case.

- I. (1) It is Legally Unsound to Convict Someone for Using a Dangerous Weapon During a Bank Robbery When the Dangerous Weapon is an Unloaded Handgun and Is, In Fact, Not Dangerous

First, it must be emphasized that Bennett was not compelled by the reasoning in Shelton and Newkirk. Those cases turned on the very practical concern of the Fourth Circuit that the enforcement of §2113(d) would be frustrated if the prosecution was called upon to prove that the weapon was loaded and operable. Indeed, the Fourth Circuit quite reasonably perceived that such a burden of proof would preclude most convictions under this subsection. The answer to this problem is to afford the prosecution the benefit of a presumption in cases like Shelton and Newkirk where no evidence as to the condition of the weapon is available. Such a process eliminates the concern that the perpetrator may thwart a prosecution under §2113(d) by withholding information concerning the weapon which only he

possesses. The Bennett rationale moves well beyond the limited framework of Shelton and Newkirk, and thus establishes the per se rule that the mere open exhibition of a dangerous weapon satisfies §2113(d).

Second, the rationale underlying the Fourth Circuit's shift in Bennett fails to recognize and make meaningful the clear difference between the assaultive behavior of a §2113(a) robbery and the aggravated assault proscribed by §2113(d) for which enhanced penalties lie. In pointing to the inherent dangers which may attend a robbery where weapons are displayed, the Fourth Circuit posits that a robber could use the weapon as a bludgeon. However, any reasonably heavy object, or even a human fist, could satisfy this criterion. Plainly, to set apart the case of an unloaded firearm from these other situations is to eviscerate the intended distinction between subsections 2113(a) and 2113(d). The second scenario envisioned in Bennett - the danger posed by a third party's possible response to the display of a weapon - is on equally inadequate justification. A similar response by a teller may be precipitated by a demand note, threatening statements, or the not uncommon pretense of a hand thrust forward inside a coat or pants pocket. Likewise, bystanders' reactions to an unloaded firearm may be no different than the reaction to loud orders, threats by the robbers and/or physical contact between the robbers and innocent victims. Again, this rationale provides no basis for adequately distinguishing between §2113(a) and §2113(d).^{4/}

The proposition that an unloaded firearm does not satisfy the aggravated element of §2113(d) lest the distinction between

^{4/} Indeed, situations creating those dangers observed in Bennett have frequently been the subject of convictions only under §2113(a). See, e.g., United States v. Johnston, 543 F.2d 55, 59 (8th Cir. 1976) (object in robber's pocket thought to be gun was in fact pocketknife); United States v. Harris, 530 F.2d 576, 579 (4th Cir. 1976) (robber placed hand in pocket in manner suggesting a weapon); United States v. Alsop, 479 F.2d 65, 67 (9th Cir. 1973) (robber used toy gun).

that subsection and subsection (a) be eliminated is not without substantial authority. In United States v. Cobb, 558 F.2d 486 (8th Cir. 1977), the court found that evidence of a loaded gun was the crucial element necessary to permit the sentence enhancement under §2113(d). The Eighth Circuit affirmed the requirement that, on the charge of aggravated bank robbery in violation of §2113(d), "[t]he weapon must be objectively capable of putting a victim's life in danger." Id. at 488.^{5/} Similarly, the Second Circuit in United States v. McAvoy, 574 F.2d 718 (2d Cir. 1978), acknowledged and confirmed earlier decisions that a robber must have the objective capability of committing an "assault" or of placing "in jeopardy the life of any person by the use of a dangerous weapon or device." Otherwise, as the Second Circuit recognized, subsection (d) would be indistinguishable from subsection (a) of §2113. Like the Eighth Circuit, the Second Circuit does not require the prosecution to establish that a firearm used by the robber was actually loaded because, under the circumstances, the jury might reasonably infer that fact. However, the Second Circuit explicitly stated that such inference arises only "absent a showing that the guns used in the robbery were unloaded." Id. at 720.

The Ninth Circuit has also indicated that the use of an unloaded gun during a bank robbery cannot provide a basis for a conviction under §2113(d). See United States v. Booth, 669 F.2d 1231, 1239-40 (9th Cir. 1981); United States v. Jones, 512 F.2d 347, 351-52 (9th Cir. 1975). In United States v. Potts, 548 F. Supp. 1239 (N.D. Calif. 1982), the trial court concluded that the case law provided a negative answer to the narrow question of

^{5/} In Cobb, the court noted that direct proof that a gun was loaded is not necessary and that this fact may be reasonably inferred from the context of a bank robbery. There, the court did not allow the jury to infer that a partially concealed object held by the robber was a loaded gun.

whether the commission of a bank robbery with an unloaded gun violates 18 U.S.C. §2113(d). The district court first observes the manifest congressional intent to distinguish between bank robbery under §2113(a) and the aggravated crime under §2113(d). The court proceeds to analyze and reject those arguments advanced by the Fourth Circuit in Bennett. In particular, the Ninth Circuit finds unpersuasive the "bludgeoning" prospect as sufficient to support a §2113(d) conviction. It states:

[T]he argument that an unloaded gun is a dangerous weapon because it can be used for pistol whipping proves too much. Any heavy metal object, wooden club or human fist could be used to strike someone during the course of a robbery, yet to punish robberies accomplished with these objects under §2113(d) would eliminate any distinction between §2113(a) and §2113(d).

Id. at 1240-41. The district court also finds little support offered by the argument that an unloaded gun is a "dangerous weapon" because of the potential violent response by a bystander. Perceiving other situations that create a danger of retaliation equivalent to that caused by the display of an unloaded gun, the court found that this suggestion "also fails to provide a sound basis for distinguishing between §2113(a) and §2113(d)." Id. at 1241. Pursuant to its analysis, the district court held that the prosecution's failure to rebut the defendant's evidence suggesting that the gun was not loaded during the robberies precluded a conviction under §2113(d).

1. (2) The Facts of Petitioner's Case do not Support a Conviction for Using a Dangerous Weapon During a Bank Robbery

The present case fits squarely within the rationale of United States v. Potts and the circuits which require, by direct proof or permissible inference, that a firearm be loaded and operable to qualify as a "dangerous weapon or devise" under §2113(d). The particular facts of this case are clear, and expose the conceptual flaws of the Fourth Circuit's opinion in Bennett which destroys any meaningful distinction between

§2113(a) and §2113(d). Here the robber was displaying an unloaded handgun - not a rifle or a sawed-off shotgun. The robber remained in the lobby of the bank and pointed the unloaded handgun generally in the direction of people but approached no one directly. Thus, the potential risk that attended this robbery did not substantially differ from that attending other robberies punishable under §2113(a). Any incremental increase in that risk is wholly speculative and entirely inadequate to satisfy the congressionally intended distinction between §2113(a) and the aggravated form of robbery proscribed by §2113(d).


In sum, Mr. McLaughlin submits that his conviction should be reversed. The continued split among the Circuits, recent contrary authority, and the fact that no other circuit has adopted the Bennett rule in the face of direct evidence that the weapon was not dangerous demonstrates that the conviction for use of a dangerous weapon during a bank robbery should not be allowed when the Government presents evidence that the weapon (here, an unloaded handgun) used during the robbery was not dangerous.

CONCLUSION

The Fourth Circuit has summarily affirmed Mr. McLaughlin's conviction for using a dangerous weapon during a bank robbery despite the Government's evidence that the weapon was not dangerous. Given the split among the Circuits on this issue, a Writ of Certiorari should issue to the United States Court of Appeals for the Fourth Circuit so that this Court may clarify the constitutional right to a fair trial in this context.

Respectfully submitted,

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